

No. 85-1347

Supreme Court, U.S.

F I L E D

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JOSÉ ORANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

GEORGE F. RITCHIE,

Respondent.

On Writ Of Certiorari To The Supreme Court of Pennsylvania.

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF JUDGMENT BELOW**

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(*Amicus Curiae, Invited by Court,*

per Order of July 7, 1986)

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QUESTIONS PRESENTED

1. Is the decision of the Supreme Court of Pennsylvania in the case *sub judice* a "Final Judgment" within the meaning of 28 U.S.C. § 1257?
2. Whether the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution require the limited disclosure of confidential child protective service records to defense counsel in a state rape-incest prosecution under the circumstances presented in this case?

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JURISDICTION

No federal jurisdictional basis exists to review the December 11, 1985 decision of the Supreme Court of Pennsylvania, *Commonwealth v. Ritchie*, ___ Pa. ___, 502 A.2d 148 (1985), on certiorari, since the Pennsylvania decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257. Therefore, the writ of certiorari should be dismissed as improvidently granted.

STATEMENT OF THE CASE

The Respondent submits the record discloses the following facts, which are material to the determination of this cause, in addition to the material disclosed in the Petitioner's Statement of the Case.

Prior to the first trial on October 23, 1979, a pre-trial conference was conducted in chambers between counsel and the trial judge to discuss the refusal of representatives from Allegheny County's Child Welfare Service (C.W.S.) to honor a subpoena *duces tecum* for the production of records compiled on the complaining witness to these charges of sexual abuse. The attorney for C.W.S. argued that the confidential nature of the records precluded their discovery, citing the confidentiality provisions of the Pennsylvania Child Protective Services Law, 11 P.S. § 2215(a).

Defense counsel was able to point out that the thirteen year old prosecuting witness complained of sexual assaults, which she claimed occurred on a regular basis of two or three times a week for a period of three years, prior to the time criminal charges were filed. (J.A. 65a, 67a). The last such event, which led to the filing of the criminal charges in this case, occurred on June 11, 1979. Defense counsel disclosed that C.W.S. conducted an in-home evaluation in September of 1978 and the girl was referred to a physician for a physical examination. It is important to

note that no criminal charges arose from the investigation conducted by C.W.S. in September of 1978. Defense counsel also raised the possibility that the challenged records could disclose the names of witnesses, who were discovered by the C.W.S. investigation and were unknown to the defense. (J.A. 65a-66a, 69a). The trial court denied the discovery request and closed the in-chambers conference by stating: "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There are no medical records that the court reviewed, and that is what we were told." (J.A. 72a).

At trial, the prosecution sought to establish the guilt of the accused on these criminal charges solely through the testimony of the thirteen year old witness. As is most often the circumstance found in criminal cases of this nature, the young girl was the only witness presented by the Commonwealth to provide direct evidence of the criminal episode. (J.A. 5a-61a). Other witnesses were called merely to establish that the complaining witness had disclosed these matters to them several weeks after the last criminal episode on June 11, 1979. The complainant testified that these criminal episodes supposedly occurred on a regular basis of three or four times a week for a period of approximately four years prior to June 11, 1979. (J.A. 15a).

During cross-examination, the witness admitted that a representative from C.W.S. had visited the Ritchie home in September of 1978, when she and the other children in the home were interviewed and she was taken for an examination to a physician as a result of this investigation. (J.A. 47a, 48a, 49a, 50a, 68a). The witness admitted that she did not disclose either to the C.W.S. representative or to the doctor in September, 1978, the fact that these episodes of sexual abuse were supposedly occurring on a

regular basis during this period of time. C.W.S. apparently took no further action until June, 1979.

After reviewing the entire record, the Supreme Court of Pennsylvania decided that the interest of Pennsylvania in maintaining the confidentiality of the C.W.S. files does not prevail against the right claimed by the defense in this case for an opportunity for effective confrontation and compulsory process under the Sixth Amendment to the Constitution of the United States. As a remedy, the Supreme Court of Pennsylvania remanded the matter to the trial court with instructions to enable defense counsel to have access to the C.W.S. files, in order to then argue to the trial court "what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence." (Pet. for Cert. 12a-13a). The Commonwealth could then argue that the error, if any, was harmless beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Pennsylvania in the case *sub judice* is not a "final judgment" for review upon a writ of certiorari within the meaning of 28 U.S.C. § 1257. This decision has not terminated the litigation between the parties so that nothing remains to be done but to perform the "ministerial act" contemplated by *Mower v. Fletcher*, 114 U.S. 127 (1885). The trial court must conduct an *in camera* hearing to determine whether the C.W.S. material is relevant to the defense; to determine whether the suppression of the material was harmless; and, if necessary, to proceed with a new trial. The Sixth Amendment issue may become moot if the trial judge determines that nothing in the file is relevant to the criminal charges.

Further, this decision fails to come within any of the four categories of "finality" found in *Cox Broadcasting*

Corporation v. Cohn, 420 U.S. 469 (1975), or in *National Socialist Party of America v. City of Skokie*, 432 U.S. 43 (1977). The proceedings in the trial court are more than merely "formal" in nature. The decision will only become "final" if the trial court finds the C.W.S. material relevant, finds that because of its suppression the defendant was denied his Sixth Amendment rights, and such suppression constituted error that was not harmless beyond a reasonable doubt necessitating a new trial. Then the issue becomes final for purposes of appeal to this Court.

This decision will not elude federal review, since Pennsylvania may continue to insist the Supreme Court of Pennsylvania erroneously decided the Sixth Amendment issue. However, this Court will then have the benefit of deciding the entire case, including the harmless error issue, without the possibility of deciding the issues piecemeal.

Finally, Pennsylvania is presenting a Sixth Amendment issue, but the State is not complaining about a Sixth Amendment *injury*. Pennsylvania is not complaining that its Highest Court abridged its Sixth Amendment rights by construing the Sixth Amendment too narrowly. Pennsylvania is complaining, though unannounced, that its Supreme Court abridged its residual Tenth Amendment rights by construing the Sixth Amendment claim of the defendant too broadly. The Tenth Amendment right of states to be free of excessive federal regulation is not the kind of "identifiable federal . . . constitutional policy" that this Court appears to of have in mind for "finality" purposes in *Cox*, supra. For this reason, the writ of certiorari should be dismissed as having been improvidently granted.

Alternatively, turning to the merits of the case, the Supreme Court of Pennsylvania has held in this case that

the Commonwealth's interest in maintaining the confidentiality of child protective service records may not override a defendant's right to have the opportunity to effectively confront and cross-examine the principle witness against him in a criminal prosecution. A state may not deny its confrontation obligations simply by alleging that the evidence it wishes to withhold is privileged under state law. *Davis v. Alaska*, 415 U.S. 308 (1974). Where a review of the *entire record* discloses that the prosecution seeks to establish the guilt of the accused on criminal charges through the testimony of a witness, who has given information to a social agency during the period of time the criminal episodes supposedly were occurring, the defendant is denied his rights under the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution to deny his attorney access to such material. The suppression of such material is in derogation of the search for truth, which is the paramount function of a criminal trial. The very integrity of the judicial system and public confidence in that system depend upon full disclosure of all relevant facts to the cause. *United States v. Nixon*, 418 U.S. 683 (1974).

After a review of the *entire record*, the defense has shown compelling reasons to uphold the Sixth Amendment claim to access the privileged material and this Court should uphold the decision of the Supreme Court of Pennsylvania.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IN THE CASE *SUB JUDICE* IS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF 28 U.S.C. § 1257.

The Supreme Court of Pennsylvania has held in this case that the interest of Pennsylvania in maintaining the

confidentiality of Child Welfare Service (CWS) files does not prevail against the right claimed by the defendant to effective confrontation and compulsory process under the Sixth Amendment to the Constitution of the United States. As a remedy, the Highest Court of Pennsylvania remanded the matter to the trial court with instructions to enable defense counsel to have access to the CWS files, in order to then argue to the trial court "what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence." (Pet. for Cert. 12A-13A). The Commonwealth would then be able to argue that the error, if any, was harmless beyond a reasonable doubt. Such a decision does not present a "final judgment" for review by this Court. 28 U.S.C. § 1257.

The classic statement defining the term "finality" for Section 1257 purposes is that stated by Chief Justice Waite in *Mower v. Fletcher*, 114 U.S. 127, 128 (1885) as follows:

[A state court judgment is final that] terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here [in the Supreme Court of the United States], the court below would have nothing to do but to execute the judgment it had already rendered. . . . Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. . . . Nothing is left to the judicial discretion in the court below.

By this standard, the *Ritchie* judgment is interlocutory, because there are several things to do on remand: to conduct an *in camera* hearing to determine whether the CWS records are relevant to Ritchie's defense; to determine whether the suppression of this material was harmless; and, if necessary, to proceed with a new trial. For purposes of comparison to see how far the

Ritchie judgment is from being "final," one can contrast it with judgments that have been deemed "final." The interpretation of this Sixth Amendment claim by the Highest Court of Pennsylvania would become "final," if the prosecutor refuses on remand to disclose the CWS records and the trial judge holds him in contempt, compare *Ryan v. United States*, 402 U.S. 530 (1971) (a case under 28 U.S.C. § 1291); or if the prosecutor refuses on remand to disclose the records and the trial judge therefore dismisses the prosecution.

The *Ritchie* judgment not only fails to satisfy the *Mower* definition of "finality," it also threatens the policies that the finality requirement is designed to serve. This requirement serves several policies: (1) It expedites state court litigation by postponing all federal appeals until the end, rather than allowing state proceedings to be interrupted with piecemeal appeals. If this Court proceeds to hear this case on the merits and affirms, it will have delayed Ritchie's retrial by at least two years. (2) The requirement of finality avoids unnecessary federal litigation by causing the Supreme Court to abstain from reviewing federal issues that further state court proceedings may moot. For example, the Sixth Amendment issue in *Ritchie* may become moot if the trial judge determines upon remand that nothing in the CWS records is relevant; or if he determines the suppression of the material was harmless; or if the jury, on retrial, reconvicts. (3) Finality streamlines federal litigation by protecting the Supreme Court from having to hear federal issues piecemeal that, if postponed, can be heard all at once. Thus, *Ritchie* in fact presents two potential federal issues: (a) The Sixth Amendment issue the Supreme Court of Pennsylvania has already decided; and (b) the further Sixth Amendment question as to whether the suppression of the CWS records was harmless. If the Supreme Court delays

review until after the judgment below is final, it can hear both of these constitutional issues at one time, rather than having to consider them separately. See generally, C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure*, Vol. 16, §§ 4008-10, plus Supplement.

This Court has further amplified the *Mower* definition of "finality." Four of the exceptions are set forth in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975); another is found in *National Socialist Party of America v. City of Skokie*, 432 U.S. 43 (1977). The present case fails to qualify under any of these five exceptions.

In *Cox Broadcasting*, *supra*., this Court identified four categories of cases in which state court judgments not meeting the strict *Mower* definition of "finality" are nonetheless final:

(1) Cases That Are Functionally Final.

The first category of cases are those which, though formally interlocutory, are in fact functionally final, because nothing more remains to be done in the lower state courts. Obviously, this exception recognizes that further proceedings may occur in the state courts, yet, for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained. This Court has deemed the judgment "final." *Id.* 420 U.S. at 479.

Quite obviously, this exception does not apply to *Ritchie*, because the further proceedings contemplated in the state courts are more than merely formal. If the trial court finds CWS material relevant, further finds that because of its suppression the defendant was denied his Sixth Amendment rights, the Commonwealth is unable to show that the error was harmless beyond a reasonable

doubt, and the trial court awards a new trial, *then* the issue becomes final for purposes of appeal to this Court.

(2) Cases In Which The Federal Issue Will Inevitably Survive The Remaining State Proceedings And No Further Federal Issues Will Emerge.

Ritchie does not present a case in which the federal issue will inevitably survive further proceedings below. *Id.* 420 U.S. at 480. Whether or not it does survive depends upon the motivation of the prosecution in seeking review in this Court. If Pennsylvania seeks review in this Court *solely* because of its desire to preserve the confidentiality of CWS records, then the Sixth Amendment issue will indeed survive, because whatever happens in the lower courts, the State will continue to argue the wrongful interpretation by the Supreme Court of Pennsylvania of the Sixth Amendment claim impairs its ability to preserve the confidentiality of CWS records.

However, if (as is more likely), the State is seeking Supreme Court review *in part* to preserve the trial court's conviction of Mr. *Ritchie*, then the Sixth Amendment issue will not inevitably survive, because (a) the trial judge may determine that the CWS records are irrelevant, (b) the trial judge may determine that the suppression of the CWS record was harmless, or (c) *Ritchie* may be retried and reconvicted. If any one of the latter three things occurs, then insofar as the State is seeking Supreme Court review out of a desire to preserve a conviction, it will drop its Sixth Amendment claim.

At this stage of the proceedings, there is no way of knowing whether Pennsylvania is seeking review in this Court in order to preserve Mr. *Ritchie*'s conviction or in order to protect the claim of confidentiality. One way of resolving that question is to wait and to see upon remand whether Pennsylvania discloses the CWS records *in cam-*

era and argues that they are irrelevant or whether it risks contempt by refusing to disclose the records. Indeed, one of the rationals underlying the “finality” requirement of Section 1291 that a subject of a discovery order postpone his appeal until he has been held in contempt is to ensure that the federal courts do not hear appeals from persons who merely *say* they are interested in confidentiality, but are unwilling to act accordingly. See C. Wright, *et al.* *Ibid.*, Vol. 15, § 3917.

Moreover, even if the Commonwealth of Pennsylvania is seeking Supreme Court review solely to preserve the confidentiality of CWS records, *Ritchie* still fails to qualify for this second *Cox* exception, because *Ritchie* is a case in which further proceedings may indeed raise additional federal questions, such as whether the error of suppressing the CWS records was “harmless.”

(3) Cases In Which The Federal Question Would Inevitably Elude Federal Review, If Further State Proceedings Occurred.

This third exception regards as “final” any federal ruling that, because of unusual rules precluding appeal by an aggrieved litigant, the federal issue remains incapable of being reviewed at a later time. *Id.* 420 U.S. at 481. This category includes cases in which a state court reverses a criminal conviction and remands for a new trial on the ground that the defendant was the victim of a federal evidentiary error. Unless the Supreme Court reviews the alleged error immediately, the Court will forever lose the chance to do so; if the jury at the second trial convicts, the state will be unable to appeal, because of the rule that precludes a party from appealing a favorable ruling; and if the jury at the second trial acquits, the state will be precluded from appealing, because of the constitutional prohibition against double jeopardy.

This third exception would indeed apply to *Ritchie*, if the Supreme Court of Pennsylvania had *remanded for a new trial* on the basis of a full disclosure of the CWS material; and it will apply to *Ritchie* if, following a remand to the trial judge, the trial judge determines that the CWS records contained relevant material the suppression of which is not harmless. But *until then*, this third exception does *not* apply to *Ritchie*, because (a) the trial judge may determine that the CWS records do not contain relevant material; (b) the trial judge may determine that the suppression of any relevant material was harmless; and (c) if the trial judge holds that the CWS file contains relevant material, the suppression of which is not harmless, there still will be time and opportunity *then* for Pennsylvania to seek review under this third exception, but *only* after the grant of a new trial.

(4) Cases In Which Immediate Review Will Preclude Further Litigation And Prevent “Serious [Erosion] Of Federal Policy.”

The fourth *Cox* exception consists of a catchall category, with a limitation. The catchall category permits review, whenever the failure to review might “seriously erode federal policy.” *Id.* 420 U.S. at 483. The limitation applies only when reversal would completely end any further proceedings in the state court. Indeed, *Ritchie* satisfies the limitation requirement, because if the Supreme Court were to reverse *Ritchie*, there would be no further litigation in the lower courts. The lower courts would simply re-enter the conviction and execute the sentence already imposed upon Mr. *Ritchie*.

On the other hand, *Ritchie* fails to qualify for the general catchall provision, because the failure to review this case immediately cannot be said to “seriously” threaten “federal policy.” This case does not present a situation

where the failure to review immediately will result in a person suffering First Amendment or Fourth Amendment or Fifth Amendment or Sixth Amendment injury. The party seeking review here, the Commonwealth of Pennsylvania, is not complaining that the lower court gave *too narrow* a construction to the Sixth Amendment; it is complaining that the lower court gave *too broad* a construction to the Sixth Amendment.

The Commonwealth of Pennsylvania is presenting to this Court a Sixth Amendment *issue*, but the State is not complaining about a Sixth Amendment *injury*. Pennsylvania is not complaining that its Highest Court abridged its Sixth Amendment rights by construing the Sixth Amendment too narrowly. Pennsylvania is complaining that its Supreme Court abridged its residual Tenth Amendment rights by construing the Sixth Amendment too broadly. The Tenth Amendment right of states to be free from excessive federal regulation is not the kind of "identifiable federal . . . constitutional polic[y]" that this Court appears to have had in mind in *Cox. Cf. Flynt v. Ohio*, 451 U.S. 619, 662 (1981).

Moreover, even if the Tenth Amendment is an "identifiable" constitutional policy, the failure to review *Ritchie* now will not "seriously" erode it, because the only erosion the State faces is the minor intrusion that consists of *Ritchie's* lawyers alone being given access to the CWS records. This intrusion is not much of an inroad because (a) the CWS statute already envisages all sorts of similar persons being given access, (including a court of competent jurisdiction pursuant to a court order, See Argument II *infra*); (b) the trial judge can impose a protective order on the lawyer not to disclose the material to anyone until its relevance has been ascertained; See, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); and (c) if the trial judge determines that the material is relevant and its suppres-

sion not harmless, there will be time *then* for Pennsylvania to seek review with this Court, but only after the grant of a new trial.

(5) The Exception Of The *Skokie* Case

The Supreme Court in *National Socialist Party v. Skokie*, *supra*., held that a refusal by the state court to stay an injunction against a Nazi march was a "final" order for purposes of the constitutional right of persons to obtain either immediate state appellate review or a stay regarding pending injunctions against their demonstrating. The commentators have suggested several ways to read *Skokie*. See C. Wright, et al., *Ibid.*, 1985 Supplement.

First, one can argue that the state court's refusal to grant a stay of the injunction was a "collateral order" within the meaning of *Flannagan v. United States*, 465 U.S. 259 (1984), and *Cohen v. Beneficial Indus. Loan Corporation*, 337 U.S. 541 (1949).¹ This exception does not apply to the present case since (a) the constitutional question in *Ritchie* is not "separate" from the Sixth Amendment harmless error issue, and (b) even if the constitutional question in *Ritchie* is separable, it does not involve an *important* federal right, since the only federal right that could possibly be raised by Pennsylvania is the Tenth Amendment argument that the federal government ought not to intrude upon state's rights.

Second, one can look to the facts of *Skokie* and conclude that it involved particular hardship or irreparable injury to an important constitutional right under the First Amendment, which has traditionally received special pro-

¹ To the extent *Skokie* applies the "collateral order" doctrine, it is applying to Section 1257, a doctrine that originated under 28 U.S.C. § 1291. See C. Wright, et al., Vol. 15, § 3911.

tection. Obviously, this exception would not apply to *Ritchie*, since (a) the hardship is nonexistent, because the government can refuse upon remand to turn over the CWS record and either suffer a contempt citation or a dismissal of the prosecution that it can then immediately appeal without suffering any legal injury; (b) even if the government produces the CWS records *in camera*, the hardship is confined to the minimal intrusion of disclosing the CWS material to counsel for the defendant; and (c) the Tenth Amendment "right," if it does exist in *Ritchie* even though unannounced, has nonetheless not received the same type of favorable treatment accorded the First Amendment.

As a litigant trying to preserve a trial judgment, Pennsylvania can fully protect itself by (a) disclosing the CWS material to defense counsel *in camera*, (b) arguing that the material is irrelevant to the defense, (c) arguing that the suppression was harmless, and (d) if unsuccessful on the preceding two arguments, by moving *then* to appeal to this Court after the grant of a new trial.

As a privilege holder trying to preserve confidentiality, Pennsylvania can fully protect itself by (a) refusing to produce the CWS records, and (b) *then* appealing to this Court whatever order the trial court determines appropriate, whether it be a citation for contempt or an order dismissing the criminal case.²

Moreover, even if a party is not required to stand in contempt in order to obtain Supreme Court review of its discovery order, *Ritchie* is still not final until Pennsyl-

² By analogy, Pennsylvania would have to take this latter course before being able to appeal a discovery order it opposes, if jurisdiction were founded upon 28 U.S.C. § 1291. *Ryan v. United States*, 401 U.S. 530 (1971).

vania takes the further step of disclosing the CWS material *in camera* to defense counsel and obtaining a ruling on its relevance and on the harmlessness of its suppression. In doing so, Pennsylvania protects the Supreme Court from having to hear a case that it might have to hear again later on the question of harmless error.

To be sure, by proceeding with the disclosure *in camera*, Pennsylvania suffers the injury of having to disclose the material that it wishes to keep confidential. But this latter injury is insufficient to override the finality requirement for several reasons: (a) Unless Pennsylvania proves its seriousness by risking contempt (or dismissal) rather than disclose the privileged material one may never know if Pennsylvania's interest in appealing *Ritchie* is based on its desire to preserve confidentiality or on its more likely desire to preserve the conviction. Pennsylvania can always say that it is primarily interested in confidentiality, but such statements are suspect when the latter interest also coincides with its prosecutorial interest. (b) The intrusion of confidentiality that consists of disclosing CWS material to defense counsel *in camera*, is very slight, particularly in light of the many disclosure provisions already contained in the statute itself. (c) Even if Pennsylvania is motivated by the desire to preserve confidentiality, and even if disclosure to the defense counsel is substantial, the underlying right at issue, *i.e.*, the right of Pennsylvania under the Tenth Amendment to be free from overly broad interpretations of the Sixth Amendment is not sufficiently important to justify yet another exception to the rule of finality.

For these reasons, this Court should find no jurisdiction to review this Pennsylvania decision, which lacks "finality" under 28 U.S.C. § 1257, and dismiss the writ as having been improvidently granted.

II. THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE THE LIMITED DISCLOSURE OF CONFIDENTIAL CHILD PROTECTIVE SERVICE RECORDS TO DEFENSE COUNSEL IN A STATE RAPE-INCEST PROSECUTION UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE.

The Supreme Court of Pennsylvania has held in the case *sub judice* that the Commonwealth's interest in maintaining the confidentiality of child protective service records may not override a defendant's right to effectively confront and cross-examine the principle witness against him in a criminal prosecution. (Pet. for Cert. 12a). By recognizing the confrontation and compulsory process claims of the defendant, the Supreme Court of Pennsylvania has concerned itself with the integrity of the truth-seeking process in the fair administration of criminal trials in its state courts. The Court observed that: "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870 (1966), (Pet. for Cert. 9a).

At trial, the prosecution sought to establish the guilt of the accused on these criminal charges through the testimony of a 13 year-old witness. As is most often the circumstance found in criminal cases of this nature, the young girl was the only witness presented by the Commonwealth to provide direct evidence of the criminal episode. Other witnesses were called to establish that the complaining witness had discussed these matters with them several weeks after the last criminal episode, which occurred on June 11, 1979.³ The complainant testified that

³The individual reporting the incident to law enforcement authorities was disclosed during the trial and there was never any doubt as to the identity of this individual.

these criminal episodes occurred on a regular basis of three or four times a week for a period of approximately four years prior to June 11, 1979. (J.A. 15a).

During cross-examination, the witness admitted that a representative from Child Welfare Services (CWS) had visited the home in September of 1978, when she and the other children were interviewed by the representative and she was examined by a physician, as a result of the CWS investigation. (J.A. 47a, 48a, 49a, 50a, 60a). The witness admitted that she did not disclose either to the CWS representative or to the doctor in September, 1978, the fact that these episodes of sexual abuse were supposedly occurring during this time and CWS apparently took no further action.

Prior to the first trial on October 23, 1979, counsel met with the trial judge in chambers to discuss the refusal of representatives from CWS to honor a subpoena *duces tecum* for the records compiled on the complaining witness. The attorney for CWS argued that the confidential nature of the records precluded their discovery, citing the confidentiality provisions of the Pennsylvania Child Protective Services Law, 11 P.S. § 2215(a).⁴ Defense counsel

⁴ At the time of trial, Section 2215(a) provided:

Confidentiality of Records. (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:

(1) A duly authorized official of a child protective service in the course of his official duties.

(2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being

indicated that CWS had conducted an investigation in September of 1978, that the complaining witness had been examined by a doctor as a result, and that the complaining witness would charge that these events were occurring on a regular basis for a period of three years prior to June of 1979. Defense counsel also raised the possibility that the challenged records could disclose the names of witnesses who were discovered by the CWS investigation and were unknown to the defendant. The trial court denied the request and closed the in-chambers conference by stating: "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There are no medical records that the court reviewed, and that is what we were told." (J.A. 72a).

The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. *United States v. Nobles*, 422 U.S. 225, 230 (1975). The accused should be "acquitted or convicted on the basis of all the evidence which exposes the truth." *United States v. Leon*, 468 U.S. 897 (1984). The Confrontation Clause of the Sixth Amendment to the United States Constitution exists to expose the truth and to "assure fairness in the

treated, where the physicians or the director or his designee suspect the child of being an abused child.

(3) A guardian ad litem for the child.

(4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.

(5) A court of competent jurisdiction pursuant to a court order.

Act of November 26, 1975, P.L. 438, No. 724, § 15, 11 P.S. § 2215.

The law has subsequently been amended and now provides for an expanded class of officials and groups to whom the reports may be made available, including the attorney general, court commissioners, and law enforcement officials. *See generally*, 11 P.S. § 2215(a).

adversary criminal process." *United States v. Cronic*, 466 U.S. 648 (1984).

This Court has recognized that the prosecutor's role transcends that of an adversary. He "is a representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). "The twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer." *Id.* In reflecting upon the nature of the criminal justice system, this Court observed:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

The Court went on to hold that:

. . . when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest of confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. *Id.* 418 U.S. at 713.

In recognizing the pernicious nature of the claims of privilege, this Court observed "these exceptions for the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* 418 U.S. at 710. The right of confrontation and compulsory process to compel the attendance of witnesses, ". . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Cross-examination ". . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, *Evidence*, § 1367, p.29 (3d Ed. 1940). Professor Wigmore further opined that, ". . . cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." *Ibid.* It was apparent to Professor Wigmore that, ". . . in some of the great Continental trials, that the failures of justice could hardly have occurred under the practice of effective cross-examination," (and cases cited therein). *Ibid.*

A. The Confrontation And Compulsory Process Clauses Of The Sixth Amendment Apply To Discovery Requests For Privileged Information.

1. The Confrontation Clause

A state may not deny its confrontation obligations simply by alleging that the evidence it wishes to withhold is privileged under state law. *Davis v. Alaska*, 415 U.S. 308 (1974).

The Sixth Amendment to the Constitution guarantees the accused in a criminal prosecution, "To be confronted with the witnesses against him." This right is secured for defendants in state, as well as federal criminal proceed-

ings, under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). The right of confrontation means more than merely being allowed to confront the witness physically. The primary interest secured by the right of confrontation is the right of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, *supra*. 415 U.S. at 316. "The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Id.*

The Confrontation Clause requires a defendant to have some opportunity to show bias on the part of the prosecution witness. *United States v. Abel*, 469 U.S. 45 (1984). In *United States v. Bagley*, ____ U.S. ___, 105 S.Ct. 3375, 3380 (1985), this Court recognized that impeachment evidence is "evidence favorable to the accused" and as such it is exculpatory evidence establishing a due process claim for disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963). Such evidence, if disclosed and used successfully, may make the difference between conviction and acquittal. *Id.* "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264 (1959).

The partiality of a witness is subject to exploration at trial and is always relevant since it discredits the witness and affects the weight of his testimony. *Davis v. Alaska*, *supra*. The exposure of a witness' motivation in testifying constitutes an appropriate function of cross-examination as well. *Green v. McElroy*, 360 U.S. 474 (1949). The con-

frontation right provides an effective means of challenging the prosecution's evidence by testing the *recollection* and *probing the conscience* of an adverse witness. *Ohio v. Roberts*, 448 U.S. 56 (1980).

The focus of the Confrontation Clause is on individual witnesses and a defendant states a violation of this right, ". . . by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which the jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, ___ U.S. ___, 106 S.Ct. 1431, 1436 (1986).

In the present case, defense counsel was permitted to cross-examine the complainant to show that a previous visit had been made by representatives of CWS to the Ritchie home without criminal charges being brought or further action taken. However, while given the opportunity to bring that *fact* to the attention of the jury, defense counsel was denied the opportunity through access to CWS files, to test the witness on *why* no charges had been brought at that time. *Davis v. Alaska*, supra. Further, defense counsel had no means of comparing statements given by the witness to CWS officials in September, 1978, and in June of 1979, and thereafter compare both with the testimony elicited at trial in November of 1979. The defendant was thus denied the opportunity to effectively test the recollection and probe the conscience of the adverse witness using these statements. *Ohio v. Roberts*, supra. By denying access to the CWS records, the defendant was thus denied the means of effective cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness. *Davis v. Alaska*, supra. The suppression of such evidence

surely "undermines confidence in the outcome of the trial." *United States v. Bagley*, supra., 105 S.Ct. at 3381.

The restriction on cross-examination may not have been direct in the sense that defense counsel was limited in the possible subjects of his cross-examination that were known to him. However, the limitation was nevertheless real in the sense that ". . . the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack." *Davis v. Alaska*, supra 415 U.S. at 318; or the jury could have given *more* weight to this fact, if accompanied by a reason such as motive, bias or the like.

The absolute impediment of privilege erected here arises from Pennsylvania's Child Protective Services Law, which was enacted to identify and protect children suffering from abuse and to provide rehabilitative services to them and to their families. (Pet. for Cert. 6a). In providing procedures concerning the investigation and reporting of abuse cases, the Law has a section providing for the confidentiality of the records CWS so compiles. 11 P.S. § 2215(a). The confidentiality provision states that reports made pursuant to the Law shall be confidential, but made available to certain enumerated classes of officials and groups. Most notably, such reports may be made available to *courts of competent jurisdiction pursuant to court order*. 11 P.S. § 2215(a)(5). As the Supreme Court of Pennsylvania agreed, it would be absurd for anyone to suggest that the General Assembly of Pennsylvania would provide a court with access, yet deny access when such materials would assist in the truth-seeking process in a criminal trial.

2. The Compulsory Process Clause

Quite frankly, the lack of relevant case law renders the search for an answer under the Compulsory Process

Clause more difficult, but existing decisional authority clearly marks the path to the conclusion that the Compulsory Process Clause applies with equal force to discovery requests for privileged information.

Chief Justice John Marshall implied, but did not have to hold, that the Compulsory Process Clause applied to privileged information sought by Aaron Burr and held by President Thomas Jefferson. *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (CC Va. 1807). Later, in *United States v. Nixon*,⁵ *supra*, the Court stated by means of *dicta* that the right of the parties to the production of all relevant evidence at a criminal trial in order to assist in the seeking of the truth has "constitutional dimensions" implicating the Compulsory Process Clause. The Court further opined that, "It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *Id.* 418 U.S. at 711.

A number of state courts and lower federal courts have held that the Compulsory Process Clause applies to privileged information. See P. Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 Mich. J. of Law Reform 371 (1981); P. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974); P. Westen, *Confrontation and Compulsory Process*. 91 Harv. L. Rev. 567 (1978).

This Court has already traveled this path ". . . in what might loosely be called the constitutionally guaranteed access to evidence" in other cases. *United States v. Val-*

⁵ The decision in *Nixon* involved discovery requests on non-constitutional grounds for material that was arguably presumptively protected by a constitutional privilege. The case *sub judice* is based upon a request on constitutional grounds for material presumptively privileged on non-constitutional grounds.

enzuela-Bernal, 458 U.S. 858, 867 (1982). In establishing the requirement for a preliminary showing of "materiality" to sustain a claim under the Compulsory Process Clause, this Court adopted the "materiality" concept already defined in the line of cases dealing with the discovery requests under the due process clause of the Fifth Amendment. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court held, "That the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Id.* 373 U.S. at 87. A *Brady* claim will prevail, "where the evidence is favorable to the accused and is material either to guilt or to punishment." *Moore v. Illinois*, 408 U.S. 786, 794 (1972); *Pyle v. Kansas*, 317 U.S. 213 (1942). Impeachment evidence is discoverable. *United States v. Bagley*, *supra*.

Certainly, more than the mere absence of testimony is necessary to establish a violation of the right. *United States v. Valenzuela-Bernal*, *supra*. Some "plausible showing" of how the testimony would have been both material and favorable to the defense must be made. *Id.*

B. The Degree Of Probativeness Privileged Information Must Possess Before Entitlement To Discovery Attaches.

The Supreme Court of Pennsylvania found the privilege in the present case must give way to the right of the defendant, *through his counsel*, to review the CWS records in order to obtain any relevant material, including statements of the victim, names of other witnesses, or other circumstances developed by the investigation. (Pet. for Cert. 11a) Relevant evidence is defined as that evidence which tends to make an issue in dispute more or less probable.

No interest on the part of the State in the combination of secrecy and prosecution justifies convicting a criminal defendant, who, if he had access to privileged information, could raise a reasonable doubt in the minds of the jury about his guilt. When confronted with the issue, the courts must necessarily "weigh" the competing interests of the state in protecting privileged information and in granting access to it in order to accord to the defense an opportunity for effective cross-examination and compulsory process, which also serves the legitimate state interest of promoting the essential truth-seeking function of its criminal trials. On the one hand, such privilege statutes must be accorded deference, because a state legislature has already identified a worthy interest deserving protection. On the other hand, the state also has an interest in the administration of justice to assure the fairness of the truth-seeking process during its criminal trials. Under the circumstances presented by this case, the interest of the defendant in confrontation and compulsory process is identical to that of Pennsylvania in assuring the fairness of this truth-seeking process.

When the interests of privilege and confrontation meet in conflict, a court must necessarily accommodate both interests, without destroying the fabric of the judicial process nor the cloak of privilege. In weighing these interests, the more compelling the need to ascertain the truth, the less weight the privilege should carry.⁶

In recognizing the need for a "materiality" threshold in order to establish entitlement to the compulsory process claim, this Court has stated that not everything that "might influence a jury" must be disclosed. *United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at 866. Clearly, a

⁶ As with any general rule, exceptions will persist such as the right against self-incrimination, which exists by virtue of the Constitution.

defendant cannot overcome a privilege merely upon the vacuous whimsy that something in the materials "might" be of assistance. On the other hand, a defendant cannot be expected, by himself, to show in advance the contents of a file he has never seen. In other words, the seeker of such information must be able to articulate *some reason* to show that the information he seeks may possess the requisite degree of probativeness.

As this Court in *Alford v. United States*, 282 U.S. 687, 692 (1931), recognized:

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from the denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to the test, without which the jury cannot fairly appraise them. . . . to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

"Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 104 (1976). The Court further explained:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt . . . this means that the omission must be evaluated in the *context of the entire record*. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to

create a reasonable doubt. *Id.* 427 U.S. at 112-113. (Emphasis added).

The "materiality" concept was further defined as follows:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, *supra*. 105 S.Ct. at 3384.

In evaluating the *entire record* in the case *sub judice*, the defendant can point to *compelling reasons* to establish entitlement for disclosure of the CWS files. At the pre-trial conference in-chambers, defense counsel was able to point out that the prosecuting witness complained of assaults, which she claimed occurred on a regular basis of two or three times a week for a period of three years. (J.A. 65a, 67a) The last such event, which led to the filing of criminal charges, occurred on June 11, 1979. Defense counsel disclosed that CWS conducted an in-home evaluation in September of 1978 and the girl was referred to a physician for a physical examination. It is important to note that no criminal charges arose from the investigation conducted by CWS in September of 1978. Furthermore, CWS possessed a file containing over 50 pages, which the trial court admitted it did not read prior to dismissing the discovery claim of the defense. (J.A. 72a)

The trial testimony indicates the young girl was the *only* witness produced by the prosecution to testify or present any direct evidence whatsoever that any crime had ever occurred. Other witnesses were called to testify that the young girl gave certain statements after she disclosed these criminal episodes to her girl friend. In this

sense then, the testimony of this witness was *crucial* to the prosecution's case.

Therefore, the record reflects the CWS records should contain two types of evidence possibly of value to the defense: (1) Oral statements of the complaining witness obtained pursuant to the CWS investigation after June 11, 1979, when criminal charges were filed, and during the initial CWS investigation in September of 1978; and (2) Other information gathered by the CWS investigation concerning possible interviews with witnesses in September of 1978, and in response to complaints of criminal activity on June 11, 1979.

The CWS files thus disclose: (1) facts, (2) that the Commonwealth of Pennsylvania has gathered, (3) in response to allegations of criminal conduct, (4) regarding the very charges for which the defendant was tried, (5) and the defendant has no reason to know nor any other opportunity or source to investigate and obtain the information.

In *Davis v. Alaska*, *supra*., this Court held that the kind of testimonial privilege at issue (the disclosure of juvenile records), must give way to the constitutional right of the defendant to discover evidence of "bias" regarding a "crucial prosecution witness." In *United States v. Nixon*, *supra*., 418 U.S. at 713, the Court held the Presidential privilege at issue there must give way to the right of the prosecutor to show a "demonstrated, specific need for evidence in a pending criminal trial."

In *Roviaro v. United States*, 353 U.S. 53 (1957), the Court held that the government's interest in protecting the identity of an informant must give way to the right of the defendant for disclosure, when the disclosure of the informer's identity, or the contents of his communication, was "relevant and helpful to the defense of the accused, or

essential to a fair determination of the cause." *Id.* 353 U.S. at 60.⁷ In *Smith v. Illinois*, 390 U.S. 129 (1968), the Court held that, notwithstanding a contrary state evidentiary law, the confrontation clause guarantees the defendant the right to cross-examine a prosecution witness as to his real name and address. In *Washington v. Texas*, *supra*., the Court held that the compulsory process clause requires, even as opposed to a contrary state provision, that a defendant be able to present the favorable testimony of a co-defendant.

In the context of the Fourth Amendment, the Court has stated that a defendant's interest in obtaining some types of evidence to show "taint" is sufficient to put the government to the choice of either dismissing a prosecution or disclosing even highly sensitive national security secrets. See *Alderman v. United States*, 349 U.S. 165 (1969); *Giordano v. United States*, 394 U.S. 310 (1969).

When one considers that the privilege established for the CWS files in the present case permits access to a court of competent jurisdiction upon court order and the state legislature by amendment later expanded the number of groups or officials who could claim access, to include law enforcement officials (meaning the District Attorney) the claim of privilege must fall to the claim of the defense based upon *compelling reasons* established after a review of the *entire record* of the case. The remaining question concerns the degree of disclosure such entitlement entails.

⁷ As in the present case, the government in *Rovario* alleged that the purpose of the privilege (to further and protect the public interest in effective law enforcement and to encourage citizens to communicate their knowledge of the commission of crimes to law enforcement officials, by preserving their anonymity) absolutely prohibited the disclosure of the informer's identity to the defense.

C. The Procedural Protections To Ensure The Reliability Of The In Camera Inspections Of The Privileged Material.

In fashioning a remedy for recognition of the defendant's entitlement to the Sixth Amendment claim, the Supreme Court of Pennsylvania remanded the matter to the trial court with instructions that the defendant, *through his counsel*, be granted access to the CWS files. The Supreme Court reminded everyone that the trial court should take appropriate steps to ensure against the improper dissemination of sensitive material gleaned from the files. These steps might include the fashioning of appropriate protective orders and the conducting of certain proceedings *in camera*, but mindful always that the defendant *through his counsel*, was to gain access to the information in order to argue to the trial court, what use, if any, the defense could have made of the material in cross-examining the complainant or in presenting other evidence. Unless the trial court was convinced that any error was necessarily harmless, it was to vacate the judgment of sentence and grant the defendant a new trial. (J.A. 12a-13a). The remedy thus fashioned was in recognition of long-standing Pennsylvania law that accorded to counsel certain privileges, because "with the eye of an advocate," defense counsel may discern relevancy not otherwise readily apparent to the trial judge or to the prosecutor. *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977).⁸ Two alternate grounds for the remedy employed here may be gleaned from existing federal authority.

⁸ Respondent recognizes the decision in *Delaware v. Van Arsdall*, *supra*., may be read to establish that this Court has jurisdiction to review a state court's *remedy* for a Federal Constitutional violation. (Stevens, dissenting).

(1) The Approach Of The Nixon Case.

In *United States v. Nixon*, *supra*., 418 U.S. at 716, n. 21, this Court fashioned a remedy whereby the District Court was given the discretion "to seek the aid of the Special Prosecutor and the President's Counsel for *in camera* consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility," or under *United States v. Reynolds*, 345 U.S. 1 (1953) or *C. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Certain factors present here disclose the need and the advisability of participation by defense counsel in reviewing the privileged material. These factors include: (a) where the state's interests in confidentiality are weak, (b) where the privileged information goes to the question of a criminal defendant's factual innocence, (c) where the relevance of the privileged information cannot easily be determined on a nonadversarial basis, (d) where the defendant has shown some reason to believe that the privileged file may contain relevant material, (e) where the defendant's adversary, the prosecutor, has access to the privileged file to inspect it at will, and (f) where the defendant is seeking the limited intrusion upon the privilege that consists of *the attorney*, and *the attorney alone*, having the opportunity to inspect the file. Under these circumstances, the privilege must yield to the right of the defendant under the Sixth Amendment to put on a defense by having his counsel review the file.

(a) The Weak Nature Of The State's Interest In Secrecy In The Case Sub Judice.

In *United States v. Nixon*, *supra*., this Court intimated that the stronger the government's interest in secrecy, the greater the burden on the seeker to show relevancy and materiality in order to gain access to such material. *Id.*

418 U.S. at 705-07. The Court distinguished for purposes of prosecutorial discovery the *qualified* presidential privilege for intra-executive communications and the possible *absolute* presidential privilege for diplomatic and military secrets.

Under the Pennsylvania statute, a number of individuals are allowed access to the file, including most notably a court of competent jurisdiction pursuant to court order. Furthermore, the fact that the General Assembly for the Commonwealth of Pennsylvania later amended the statute expanding the number of classes of individuals permitted access further indicates the limited nature of the confidentiality provided. Of note also is the fact that the District Attorney now has access to the files, regardless of whether or not he actually uses those files during the trial.⁹

(b) The Significance Of Factual Innocence.

The Court has distinguished, for constitutional principles, between privileged information that goes to *factual* innocence and privileged information that goes solely to issues of *legal* innocence. Compare *Roviaro v. United States*, *supra*., and *Smith v. Illinois*, *supra*., with *McCray v. Illinois*, 386 U.S. 300 (1967). The former cases allowed disclosure, when the credibility of the informant became an essential issue at trial. The later case held that the defense was not constitutionally entitled to discover the identity of a government informer for the purposes of challenging a search or a seizure.

The significance of the request by the defense in the case *sub judice* for the opportunity to effectively cross-

⁹ Whether or not the District Attorney uses the material during the trial is not really relevant, unless his nonuse may indicate unfavorable information from the prosecution viewpoint.

examine the only witness for the prosecution and for possible exculpatory evidence to be used at trial is all the more apparent, because of its bearing upon the central question of fact relating to the credibility of the witness.

(c) The Need For An Adversarial Procedure.

The Supreme Court has distinguished for constitutional purposes between issues that are so complex, factually, that they should be resolved on an adversarial basis and issues that are so simple they need a less elaborate protection system. *Compare, Alderman v. United States*, 394 U.S. 165 (1969) (whether an illegal search had so "tainted" the prosecution's case was so complex, factually, that it could not be resolved on an *ex parte* basis, but must be resolved on an adversarial basis), with *Taglianetti v. United States*, 394 U.S. 36 (1969) (whether the defendant was the person whose house was illegally searched or whose conversations were illegally overheard constituted a simple factual question that a judge could resolve *ex parte*).

In this manner also, the trial court will benefit from defense counsel's "well-informed advocacy." *Alderman v. United States*. *supra.*, 394 U.S. at 184; *Jencks v. United States*, 353 U.S. 657, 669 and n.14 (1957). "In our adversary system it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, *supra.*, 384 U.S. at 875. As this Court has observed:

An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . . may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all

relevant circumstances. . . . [T]he task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court. . . . *Alderman v. United States*, *supra.*, 394 U.S. at 182.

Measured by this standard, the present case calls for an adversarial process. Whether the privileged information could be useful to the defense is the kind of determination that is so complex factually it can only be made accurately with the participation of defense counsel, who is thoroughly familiar with the defendant's case and motivated to view the issues from the defense prospective.

(d) The Defense Showing Of Some Reason To Believe That The File May Contain Exculpatory Material.

Quite justifiably, this Court is reluctant to allow "fishing expeditions" based upon insincere claims of need in order to obtain access to government files to perhaps blackmail the prosecution into dropping the case. Very simply, the protection against such blackmail is to require the defense to make *some showing* that the privileged file may contain exculpatory information. Based upon the foregoing argument, *supra.*, subpart B, Mr. Ritchie has shown *compelling reasons* for access to the privileged information based upon a review of the *entire record*.

(e) The Defendant Is Seeking Access To A File, To Which His Adversary, The Prosecutor, Has Access.

State rules of evidence that allow prosecutors a one-way advantage in the gathering or presentation of evidence in a criminal trial are necessarily suspect. See *Wardius v. Oregon*, 412 U.S. 470 (1973). Given different circumstances and a different privilege statute, the State may have a stronger argument in keeping such information confidential. However, Pennsylvania may not under *Wardius*, *supra.*, create a one-way privilege to the disad-

vantage only of the defense by giving the prosecutor the right to inspect CWS files whenever he chooses.

(f) The Limited Intrusion Of Defense Counsel.

The Pennsylvania Supreme Court held the privileged information here must be disclosed on a limited basis to *defense counsel*; it is *not* to be disclosed to the defendant or to the public. As an officer of the court, counsel can be ordered to keep the privileged information secret. *Cf., Seattle Times Co. v. Rhinehart*, *supra*.

It is important to note that the Pennsylvania Supreme Court did *not* invalidate the entire statute. On the contrary, the Court ruled on the privilege only to the limited extent that a defendant's *lawyer* be allowed into the judge's chambers to inspect material to which his opponent, the prosecutor, already has access.

The limited nature of the intrusion is relevant, since, to the extent the Sixth Amendment issue turns on a balancing of the State's interests against the defendant's, the State's interest in keeping defense counsel out of the judge's chambers is much less than its interests in withholding completely the CWS material from the public at large. *Cf., United States v. Nixon*, *supra*., 418 U.S. at 713-16.

(2) The Alternative Approach Under The Freedom Of Information Act Cases.

An alternative analysis exists for the remedy pursuant to decisions of the lower federal courts under the Freedom of Information Act, 5 U.S.C. § 552. Admittedly, the Court of Appeals has rejected requests for counsel inspections on the ground that *other* protections existed in those cases to ensure that the *in camera* procedures were reliable and accurate, thus implying that in the absence of such supplemental procedures, a plaintiff seeking such infor-

mation might have a statutory right under the FOIA to insist that his lawyer be allowed to inspect and argue the relevance of the presumptively privileged material. These other procedures cited with approval included: (1) a requirement that the government prepare as full an affidavit as possible for disclosure to plaintiff's counsel, explaining its reasons for withholding the requested information; (2) a requirement that the government also prepare, if necessary, a confidential affidavit for the judge's benefit to assist him in reviewing the privileged material *in camera* and *ex parte*; (3) and a requirement that the privileged material, plus accompanying affidavits, be sealed and filed with the trial court as an exhibit for the benefit of any appellate court that might wish to review the matter. See, e.g., *Weberman v. NSA*, 668 F.2d 676 (D.C. Cir. 1982); *Phillippi v. CIA*, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). See also, *United States v. Schneiderman*, 104 F. Supp. 405 (C.D. Calif. 1952).

Given the failure of Pennsylvania to provide alternate, reliable safeguards of the foregoing nature to ensure that *in camera* and *ex parte* review procedures are accurate and reliable, Pennsylvania has the constitutional obligation to permit defense counsel to participate with the trial judge in reviewing the CWS file to determine whether it contains relevant information. Stated otherwise, unless a state creates adequate and reliable procedures to safeguard *in camera* inspections, it has a constitutional obligation to ensure access to accurate and reliable information by allowing defense counsel to participate in the inspection process. In this manner, each state may determine for itself the nature of its privilege, balance against it the competing interests of the need by the defense to obtain access to such information and thereby ensure the integrity of the truth-seeking function paramount in criminal trials.

Since the Pennsylvania statute allows production of the CWS privileged information pursuant to a court order issued by a court of competent jurisdiction, one must presume the General Assembly balanced the competing interests, recognized the importance of the truth-seeking process in criminal trials and provided the remedy utilized here by the Supreme Court of Pennsylvania.

CONCLUSION

For these reasons, the writ of certiorari should be dismissed as having been improvidently granted, since the decision *sub judice* does not present a "final judgment" for review pursuant to 28 U.S. § 1257.

Alternatively, upon addressing the merits of the Sixth Amendment claim, this Court should affirm the judgment rendered by the Supreme Court of Pennsylvania.

Respectfully submitted,

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*(Amicus Curiae, Invited by Court,
per Order of July 7, 1986)*
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